

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DOMINIQUE DEANS,

Defendant and Appellant.

F073871

(Super. Ct. No. BF157881A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Paul Kleven, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Michael Dolida, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

INTRODUCTION

Defendant Dominique Deans, who was alone, was arrested after officers with the Bakersfield Police Department stopped his vehicle and observed a firearm, later determined to be legally registered to defendant, partially hidden under a baseball cap on the front passenger seat. Defendant was charged with and convicted by jury of one count of carrying a concealed firearm within a vehicle (Pen. Code, § 25400, subd. (a)(1)¹ (count 1)) and one count of causing a concealed firearm to be carried within a vehicle (§ 25400, subd. (a)(3) (count 2)). As to each count, the jury also found true the alternate penalty provision allegation under the gang statute. (§ 186.22, subd. (d).) Pursuant to section 186.22, subdivision (d), the trial court sentenced defendant to the middle term of two years on each count and stayed the sentence on count 2 under section 654.

Defendant's main target on appeal is the penalty provision.² He claims the jury's findings that the offenses were gang related are not supported by substantial evidence. He also claims that some of the gang evidence was hearsay under federal and state law and its erroneous admission was prejudicial. (*Crawford v. Washington* (2004) 541 U.S. 36; *People v. Sanchez* (2016) 63 Cal.4th 665.)³ Additionally, although he does not advance an independent claim of prosecutorial misconduct, defendant invokes the cumulative error doctrine and requests we review the prosecutor's violation of an in limine ruling in conjunction with his claim that he was prejudiced by the error in admitting hearsay evidence. Finally, defendant requests we conduct an independent review of the trial court's determination that Officer Escobedo's personnel file contained

¹ All further statutory references are to the Penal Code unless otherwise stated.

² Although the parties refer to subdivision (d) of section 186.22 as an enhancement, the California Supreme Court has held it is an alternate penalty provision. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900.) The enhancement under subdivision (b) and the penalty provision under subdivision (d) share the same elements, however.

³ The trial in this case occurred shortly before the California Supreme Court issued the decision in *People v. Sanchez*, *supra*, 63 Cal.4th 665.

no discoverable information. (Evid. Code, § 1043; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).)

With the exception of his request for an independent review of the *Pitchess* proceedings, the People dispute defendant's entitlement to any relief on his claims.

As we discuss in greater detail below, the penalty provision applies only to offenses that are gang related, but "[n]ot every crime committed by gang members is related to a gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*).) In this case, the prosecution's gang expert testified that defendant was an active member of the West Side Crips (WSC) at the time of the crime, and he was wearing WSC gang colors when he was stopped by the police. However, mere membership in, or association with, a criminal street gang does not suffice to support the gang related penalty provision. (*People v. Rios* (2013) 222 Cal.App.4th 542, 574 (*Rios*).) We agree with defendant, therefore, that the jury's findings that the concealed weapon offenses were committed for the benefit of, at the direction of or in association with WSC are not supported by substantial evidence.

Accordingly, we reverse the penalty provision findings and remand the matter for resentencing. This determination renders moot defendant's challenge to the findings on the grounds that he was prejudiced by admission of hearsay evidence and that the prosecutor's violation of the in limine ruling resulted in cumulative error. After conducting an independent review of the record, we conclude the trial court did not abuse its discretion in determining that Officer Escobedo's personnel file does not contain any discoverable information. With the exception of reversal of the penalty provision findings, the judgment is affirmed.

FACTUAL SUMMARY

I. Prosecution Case

A. Facts Underlying Concealed Weapon Offenses

On March 6, 2013, at approximately 6:00 p.m., Officers Escobedo and Martinez were on patrol near Lowell Park in Bakersfield, which is located within the traditional boundaries of the WSC criminal street gang and is a known hangout for WSC gang members. The officers were heading southbound when they heard loud music coming from a Ford Mustang that was traveling eastbound at a slow rate of speed.⁴ The driver, identified as defendant, was slouched over to his right to the extent that the officers saw only his left shoulder and back as he drove by. Martinez initiated a traffic stop to investigate the loud music. As the officers exited the patrol car, defendant remained slouched over to his right but the officers could not tell what he was doing. Defendant straightened up as Martinez approached the driver's side of his car.

Defendant was alone in the car and was wearing a bright turquoise baseball cap. As Martinez informed defendant why he was pulled over and asked for his identification, Escobedo, who was on the passenger side of the car, spotted the barrel of a black semiautomatic handgun on the front passenger seat, protruding from underneath a dark blue "TC" logo baseball cap. Escobedo alerted Martinez to the firearm and defendant was removed from the car without incident. Once defendant was out of the car, the officers could see the bottom inch or two of his turquoise shirt, which he was wearing underneath a black sweater.

After Escobedo spotted the firearm on the seat, defendant stated he was a corrections officer and had a concealed carry weapons permit (CCW). When asked for documentation, defendant then admitted he was not a corrections officer and did not have

⁴ Officer Martinez and defendant estimated the car was traveling 25 to 30 miles per hour, and defendant described the area as residential.

a CCW, but stated he was taking criminal justice classes. Escobedo testified that after defendant was read his rights, he stated he had the firearm “because of all the violence in the neighborhoods” and with respect to the neighborhoods he was referring to, defendant stated, “East Side.” When Escobedo asked defendant if he was affiliated with anyone, defendant said the “West Side” and when asked to clarify, he specified WSC. Escobedo described defendant as “a little evasive” when asked about the hat on the passenger seat, but defendant acknowledged the “TC” on the hat stood for Carnation Tract, a WSC subset.

At the time he was pulled over, defendant was wearing an empty firearm holster on his right hip and officers located three ammunition magazines in the car: one in the front cup holder, one inside the cavity in the front of the center console, and one inside an unlocked gun case in the trunk of the car. Defendant admitted that the firearm inside the vehicle was loaded at some unspecified point, but he denied disarming it just prior to his contact with officers. The firearm was determined to be legally registered to defendant.

B. Gang Evidence

1. Background

Officer Montgomery, who testified as the prosecution’s gang expert, explained that a rivalry developed between the East Side Crips (ESC) and allies WSC and the Country Boy Crips (CBC).⁵ He identified the traditional WSC boundaries as between California Avenue to the north, Terrace Way to the south, H Street to the west and Union Avenue to the east. Montgomery testified that there is a rivalry between WSC and the Bloods, but ESC is WSC’s biggest rival, and that Union divides WSC territory from ESC territory. Montgomery stated that the main area of congregation for WSC is Lowell Park, but gang members also frequently gather in the Carnation Tract area, at a gas station at Eighth and P Streets, and at the north side of Lowell Park at Sixth Street and Q Court.

⁵ Officer Escobedo was also qualified as an expert on gang issues.

On weekends after the bars close, the AM/PM at Brundage Lane and H Street is a WSC gathering spot as well.

Regarding gang colors, Montgomery testified turquoise is associated with WSC, red is associated with the Bloods and royal blue is associated with ESC; and the term “flying colors” refers to gangs wearing their colors openly in public. Common WSC symbols are W for West, WS for West Side, and WSC for West Side Crips. Tattoos and hand signs also include Lowell, WSG for West Side Gangster, TC for Carnation Tract and the number six for Sixth Street; and graffiti includes WSGC for West Side Gangster Crips. Montgomery identified ESK (East Side Killer) and BK (Blood Killer) as examples of disrespectful symbols employed by WSC. Montgomery was not aware that any of defendant’s approximately 16 tattoos were gang related, however, and he was also not aware of any gang moniker attached to defendant.

Montgomery testified that the primary criminal activities of WSC include illegal possession and sales of narcotics, weapons violations, murders, robberies, burglaries and carjackings; and for the purpose of establishing a pattern of criminal gang activity, he testified about six predicate offenses, all of which resulted in convictions, but none of which involved defendant.⁶

2. Evidence of Defendant’s Gang Membership

a. Police Contacts

In support of Montgomery’s ultimate opinion that defendant was an active WSC gang member at the time of the offenses, the prosecution introduced evidence of multiple “street checks” and police reports, some of which involved Montgomery personally and some of which involved other officers, most of whom testified at trial.⁷

⁶ As the predicate offenses are not relevant to the issues raised in this appeal, we do not discuss the offenses in any further detail.

⁷ Montgomery described a street check as documentation of a contact with police that usually does not involve the commission of a crime.

1) Contacts Predating Offenses

On July 31, 2009, officers went to an apartment looking for a WSC member wanted for a firearm offense. Officers did not locate the wanted individual, but defendant and his brother, Herman Deans (Herman), were at the apartment. Officer P. Beagley testified that he spoke with them, and they admitted their WSC membership. On cross-examination, Beagley testified that he did not recall if he asked defendant if he was a member or an affiliate.⁸

Officer Cooley testified that defendant was shot on April 10, 2011. Cooley interviewed defendant at the hospital several days later while defendant was undergoing treatment. Defendant agreed with Cooley's observations that defendant was shot because he is from the West Side and the shooter is from the East Side. Cooley also testified that prior to the shooting, he had contacts with defendant, most of which occurred within WSC boundaries, and he saw defendant with WSC gang members.

During cross-examination, Cooley testified that defendant described the shooting to him, but conceded that he was not aware defendant was unable to identify the shooter. He also testified during cross-examination that defendant lived at a few different addresses, a couple of which were within traditional WSC boundaries and one that was not; that a few of the contacts he had with defendant were near where defendant lived; and that one WSC member he saw defendant with was defendant's brother, Herman.

Officer Montgomery testified that with respect to the shooting, defendant's girlfriend stated defendant "[ran] with the West Side," and a fight had broken out between the West Side and the East Side. Montgomery also testified that defendant did not identify the shooter either initially or subsequently in court.

⁸ Montgomery testified that there is a difference between being a gang member and a gang affiliate, but that Beagley's inability to remember the precise inquiry did not concern him.

2) Contacts Postdating Offenses

On April 13, 2014, Officer Escobedo observed defendant in the AM/PM parking lot with a group of people. Escobedo explained that the parking lot of the AM/PM gas station at Brundage and H becomes a WSC hangout after 2:00 a.m. on the weekends, when the bars close. Defendant was wearing a TC beanie cap and was in the company of several other people wearing turquoise.

On August 10, 2014, Officer Dickson responded to the scene of a hookah lounge where approximately 300 people were gathered in the parking lot. There were two large groups of people exchanging obscenities and Dickson recognized several as ESC members. Dickson testified that one ESC member was arguing with defendant and defendant's cousin, Dwayne Taylor, aka Grizz or Pooh Grizz. Dickson heard Taylor say, "I'm Grizz. I'm from the West Side. You're from the East, n____." Defendant was standing close to Taylor.

Based on a police report prepared by Officer Malley, who did not testify, Officer Montgomery relayed that on November 10, 2014, officers went to a residence to locate Aubrey Smith, who had an outstanding warrant. After Smith was apprehended, he identified defendant and Ingram Hammond as active WSC members.

On November 16, 2014, Officers J. Beagley and Romero responded to Martini's Lounge, where they stopped a vehicle driven by defendant. Beagley testified that he and defendant discussed the murder of an individual with ESC ties by someone with CBC ties, which had occurred the prior week. Defendant told Beagley he was out of town at the time, but was aware of the shooting. Beagley testified that defendant said he was a WSC member and stated something to the effect of, "[I]f it's my time, it's my time. I don't care." Defendant also talked about WSC and ESC rivalry, said he would have problems if he ran into an ESC member, and said if he shot an ESC rival, it would raise his status within the WSC gang.

On December 27, 2014, Officers Escobedo and Martinez responded to the AM/PM on Brundage and effected a traffic stop of a vehicle. Michael Whatley, Herman and defendant were inside. Both officers testified that Whatley was an admitted WSC member who was later shot and killed by a rival ESC gang member, and Escobedo testified that defendant's brother, Herman, associates with WSC.

On February 8, 2015, Officers Romero and Malley were in an unmarked police car when they observed a vehicle that was idling in park in the area of the AM/PM at Brundage and H. Romero testified that the driver kept revving the engine, honking the horn and flashing the high beam headlights. Whatley was in the driver's seat and defendant was in the passenger seat of the vehicle. As Malley approached the driver's side and Romero approached the passenger side, Romero detected a strong odor of marijuana and alcohol coming from the vehicle, and defendant was yelling obscenities to the effect of, "F___ the police." On cross-examination, Romero testified that in the police report, he wrote only that defendant was yelling obscenities and he did not document defendant's specific statements.

On February 14, 2015, Officer Montgomery stopped a vehicle across the street from the AM/PM. Defendant was inside the vehicle with Herman, who was wearing a turquoise cap.

On March 21, 2015, just a few hours after Whatley was shot and killed by a rival ESC gang member, Officer Martinez stopped a vehicle driven by Saddam Ali, a known WSC gang member. Defendant was a passenger in the vehicle and was wearing a baseball cap with a white "W" on it, which is associated with WSC. Martinez explained that following Whatley's shooting, the gang unit had saturated the area to prevent retaliatory shootings and, prior to being pulled over, Ali's vehicle was spotted in ESC territory, where it passed by another vehicle that had been stopped by officers and was occupied by three known WSC members.

Officer Montgomery testified that he saw defendant at the scene of Whatley's shooting and then again later on when Ali and defendant drove by as he was conducting a vehicle stop.

On April 21, 2015, Officer Lugo responded to an apartment that belonged to Herman and another WSC member, Bryson Blair. After officers contacted Blair and he exited the apartment, they located defendant and Herman in one of the bedrooms.

On August 16, 2015, Officer Montgomery was involved in conducting surveillance of a party for Dion Davis being held to celebrate Davis's birthday and his release from prison. Montgomery testified that Davis is a very respected "OG" or "shot-caller" within the gang, and defendant was present at the party, along with other WSC members, including Taylor.

Officer Clark testified that on November 15, 2015, he stopped a vehicle driven by Tanarri Stocker, a known CBC member. Defendant was a passenger in the car. Stocker told Clark that he was coming from Club 21 and heading to the AM/PM at Brundage and H.

Finally, Officer Montgomery testified that the gang task force frequents Club 21 around closing time and, over the weekend preceding his testimony, an active fight occurred there. Montgomery was one of the responding officers and he saw defendant walking and laughing with Bobby Fisher, who is a documented WSC gang member.

b. Other Evidence of Gang Ties

Officer Montgomery testified that during the jail booking process, individuals are asked if they belong to or associate with any gang in or out of jail, which clique or set they are involved with, and if there is anyone they need to be kept away from in jail. Defendant was booked for the offenses in this case on March 7, 2013, and Montgomery testified that information from that booking reflects that defendant belongs to WSC and needs to be separated from the Bloods. Montgomery was not present when defendant was booked, however, and, during cross-examination, he testified that he did not know if

defendant claimed membership versus association with the gang and he did not know if defendant stated the membership or association was inside jail versus outside jail. Montgomery also did not know if the booking information was merely transferred from another screen.

In 2013, Taylor released a rap video on YouTube that was filmed in Bakersfield, mostly in Lowell Park.⁹ Officer Montgomery opined that the video was paying respect to street gangs in Bakersfield. Defendant appears in the video 17 times wearing a turquoise shirt. In one scene, defendant also wears a turquoise hat while seated next to Taylor. In another scene, defendant makes gang signs—the number 6 and the letter W—with his hands. However, Montgomery conceded that other than the video, he was unaware of any evidence showing defendant throwing gang signs or placing defendant in Lowell Park.

Finally, the jury was also shown various screen shots of gang-related photos that were posted on Facebook. One of the photographs, which was taken from Fisher's account, featured Whatley and Taylor throwing gang signs. Defendant and Herman were also in the photo, although defendant was not throwing any gang signs.

3. Hypothetical

The prosecutor asked Officer Montgomery the following hypothetical question: “Assume that you have an active [WSC] criminal street gang member who's driving a vehicle by themselves while wearing a turquoise hat and a turquoise shirt, which is covered by another shirt, but still visible, and also has another hat inside that same vehicle with a CT or TC in there, and that hat is covering a firearm, a semiautomatic. Also in that vehicle are loaded magazines which fit that particular firearm. While driving with the gang colors, this active [WSC] is obviously armed with this firearm. He also

⁹ Although witnesses did not identify the precise date of release, the song in the video refers to an album that was released in July 2013.

makes—he’s stopped by officers. He makes statements. He states that he has the firearm because of the recent violence in the neighborhood. He admits—sorry—and that he is worried about the East Side. [¶] Based on that little hypothetical that I just gave you, do you have an opinion as to whether or not the firearm was held either at the benefit of or at the direction of or in association with the criminal street gang [WSC]?”¹⁰

Montgomery opined that the offenses were committed in association with and for the benefit of the WSC criminal street gang. He explained, “*The association factor comes down to the clothing located during the incident.* [Defendant] was observed wearing a turquoise hat and a turquoise undershirt and also in the car had an additional hat with the letters TC on it. All of those factors associate himself with the [WSC] criminal street gang.” (Italics added.) The gang expert added that he was flying the gang’s colors and, after the prosecutor included the location of Lowell Park to the hypothetical, that he was doing so “*directly below the stronghold of the [WSC], Lowell Park location.*” (Italics added.)

With respect to benefitting the gang, Montgomery testified, “Firearms benefit a gang, specifically the [WSC], for a few different reasons, and those reasons consist of firearms are used for not only offensive purposes, to commit crimes, but also defensive purposes. If somebody has a subject that’s going to attack them, they know it’s coming, word on the streets, they may need this firearm to further protect themselves. And firearms are also used in the gang life to commit crimes, such as robberies or witness intimidations. If they can use a firearm to commit the robbery, the monies gained from the robbery go towards benefiting the gang, to buy more ammunition for the firearms, to buy narcotics to sell for the gang. Firearms benefit the gang tremendously.”

¹⁰ We note that the prosecutor did not include in the hypothetical the fact that the firearm was legally registered to defendant and, on cross-examination, Montgomery conceded that it is rare for gang members to have firearms registered to themselves.

The prosecutor then added to the hypothetical the fact that the individual carrying the firearm in the vehicle had been shot previously by a rival gang member from the East Side. Montgomery responded, “When a [WSC] member, gang member, has been shot by an [ESC] gang member, it would probably instill fear within that gang member. That way he would have to arm himself to further defend himself from future attacks from the rival gang. [¶] And in this incident I talked about the colors that he was wearing. He’s actively showing his gang while he’s driving a car around, so he will become an easier target for a rival gang if they wanted to target him.” Montgomery testified further that it is not uncommon for shootings to occur in the general area around Lowell Park.

II. Defense Case

A. Defendant’s Testimony¹¹

1. Concealed Weapon Offenses

Defendant, who was 24 years old at the time of trial, testified that in early 2013, he legally purchased a gun, three ammunition clips and a holster from a store for his protection and that of his family. Included in the gun purchase was a blue gun case with a lock, and defendant also purchased a holster to store the gun because he was instructed by the clerk to keep the clips in the gun case, separate from the gun. Defendant testified that he kept the gun and the ammunition in a closet at home, and that he had never used the gun or allowed anyone else to use it.

On March 6, 2013, following a dispute with roommates, defendant was in the process of rather suddenly moving his personal belongings, which included 50 baseball caps, from his former residence on Orange Street to his new residence on T Street. Defendant testified that the residence on Orange Street is in WSC territory and he was taking the most convenient route between the two locations. Defendant, who is tall, had

¹¹ The prosecutor impeached defendant with evidence that he committed theft in 2009. On redirect examination, defendant testified that he admitted the theft of some candy and a pack of condoms, he participated in a program, and the case was dismissed.

the driver's seat pushed back as far toward the rear seat as it would go. He was playing music and testified that his left hand was on the wheel, his left elbow was on the window and his right elbow was on the center console. He denied he was leaning to his right while driving, reaching for anything or moving his hand.

After the officers initiated the traffic stop, defendant pulled over. Defendant testified that Martinez asked for his license and before he had the chance to say anything, Escobedo said, "Don't fucking move or I'll fucking kill you. We have a gun." Defendant exited the vehicle as instructed and after Martinez asked him if he was working or in school, he told Martinez that he was in school because he wanted to be in the corrections field and that he would like to obtain a CCW. He denied stating that he was a corrections officer or that he had a CCW. Defendant also commented, referring to the police department, "It's a lot going on right now and you guys are really hot." Defendant testified that he had studied criminal justice for one and one-half years, but did not complete his studies.

Defendant testified that he did not routinely carry his gun in the car and when he was pulled over, he only had it with him because he was moving his personal belongings. Prior to moving the gun that day, defendant checked that it was unloaded and in the safety position, and he placed it on the floor of the passenger side with the barrel toward the passenger door. Defendant testified that the gun was on the floor uncovered when he was pulled over and the locked gun case, with the clips inside, was in the trunk of the car. He denied the gun was on the seat next to him underneath a hat or that there were two ammunition clips in the cabin of the car. Defendant testified that at some point, Escobedo took the keys from the car, unlocked the gun case and opened it.

2. Gang Evidence

Defendant testified that he grew up in Bakersfield, and the middle school and one of the high schools he attended are located within traditional WSC boundaries. In 2005, defendant met Whatley and the two became very good friends. Defendant testified that

during those years, he lived at two different locations within WSC boundaries, and he also lived at locations both outside WSC boundaries and inside ESC boundaries.

Defendant stated that he has had contact with the police numerous times, usually when “[m]inding [his] business,” and he is open and honest with them about who he knows. He acknowledged awareness of WSC and CBC gangs, and testified that being an active WSC gang member means “a person is accepting who they are and they have no shame in it.” Defendant denied that he is an active WSC gang member or that he hangs out or associates with WSC gang members, however, and he stated that the officers who testified that he admitted WSC membership were lying. He also denied that the color turquoise has any meaning to him or that Sixth Street, P Street, and the letter W mean anything to him. Defendant testified that he wears all colors, including turquoise, red and royal blue, and that he owns approximately 50 different baseball caps. Defendant stated there are no baseball caps he is unwilling to wear. He also testified he has been to Lowell Park, which is near where he resides, but not with gang members.

In April 2011, defendant was shot multiple times. Wayne West III, whom Cooley had testified was an ESC gang member, was tried in relation to the shooting and, during West’s trial, defendant testified that West was not the shooter. In his trial in this case, defendant testified that he was not able to identify the shooter and that he did not recall the entire hospital interview with Cooley, at which time he was heavily medicated. Defendant stated that the shooter was much shorter than West and he was unable to tell the shooter’s gender. Defendant also testified that he and West had worked together, but he denied they ever fought or that he ever told officers they fought.

Regarding Taylor, defendant testified that he and his cousin are close, but denied that he knows Taylor’s gang status or that the music video he appeared in is a gangster rap video. Defendant testified that the director of the video provided the turquoise shirts he and others wore, and that the shirt had a picture of Taylor’s music CD on it. He admitted he purchased the turquoise shoes and hat he wore, however. Defendant testified

that he was paid for his appearance in the video, and that he was instructed on where to go and instructed to make the number six with his hands in the screen shot from the video. He denied he was making the letter W, however.

Regarding the photo from Fisher's Facebook account, defendant testified that it was taken at a club, which was filled to its capacity of 190 people. Defendant acknowledged he was aware the photo was being taken, but testified he does not have a Facebook account and was not aware it was posted on Facebook. He also acknowledged that numerous photos of Whatley throwing gang signs were shown to the jury, but he testified that because he was behind Whatley in the one photo, he was not aware Whatley was making gang signs and Whatley was not an active WSC gang member as far as he knew. Defendant said he arrived at the club by himself that night and, although he sees Fisher around, he does not know Fisher personally.

Defendant explained that Blair, whom Lugo testified is a WSC member, and Herman lived together and although he had contact with Blair through Herman, he did not know Blair personally or hang around with him. He acknowledged knowing Hammond but denied knowing Smith, and testified he had no idea why Smith would identify him as an active WSC gang member. He also denied knowing several other gang members identified by the prosecution's witnesses, including those involved in the predicate offenses and he stated that although he knows Ali, they are not close.

Defendant denied that the incident at the hookah lounge on August 10, 2014, was gang related. He testified that the only argument was between Taylor and the mother of Taylor's child and although there were ESC members present, they were not involved. Defendant also denied telling J. Beagley in 2014 that he was a WSC gang member, although he recalled being stopped by police near Martini's Lounge.

Defendant testified that he is close with Herman, they hang out almost daily, and he would go to the club if he knew Herman was going to be there. Defendant denied Herman is a gang member or affiliated with WSC. Defendant acknowledged hanging out

at the AM/PM on Brundage, but said it was close to his home and he knew people who hung out there. He also said he would go to the AM/PM if he knew specific women were going to be there. He testified that he went to the AM/PM on February 8, 2015, with Whatley to meet up with his ex-girlfriend, but he testified that he respects law enforcement generally and he denied yelling obscenities at the police during the incident at the AM/PM described by Romero. On February 14, 2015, he went to the AM/PM with his brother to meet up with a different woman.

Defendant denied being present when Whatley was shot on March 21, 2015, but he acknowledged that after one friend notified him of the shooting, another friend dropped him off at the location. Defendant said he was unable to verify Whatley had been shot and killed so he went home. After receiving a call that Herman had been stopped at East Third and King Street, however, he called Ali and asked for a ride to that location to check on his brother. He testified that he did not see Herman so he left.

Regarding the incident with Stocker on November 15, 2015, defendant testified that he did not go the club with Stocker that night and he did not intend to go to the AM/PM, but he needed a ride home from Stocker because the person who drove him to the club was drunk. Defendant testified that he had known Stocker for approximately one year, but did not know his gang status.

Defendant denied knowing Dion Davis and said they met at Davis's birthday party. Defendant explained that he attended with a friend and was not invited by Davis.

B. Gang Investigator

Harlan Hunter, an investigator and professor of criminal justice, also testified on behalf of the defense. Hunter's identification of the traditional boundaries of WSC territory was consistent with Montgomery's testimony. However, Hunter explained that the territory just east of Union is a Hispanic neighborhood claimed by the Varrio Bakers and ESC territory is east of that neighborhood, so there is less contact between WSC and ESC gangs than one might believe. He also agreed that turquoise and sometimes black

are associated with WSC, but stated that not everyone wearing turquoise within the boundaries of WSC territory is a WSC gang member.

Hunter discussed the different levels of gang involvement. He described an active gang member as someone who is a “hard-core” member “gangbanging 24/7.” An inactive member is someone who claims membership but seldom participates in gang activity. An associate is not a member but provides support to the gang and assists the gang with its goals, including retaliation against rivals. Finally a “wannabe” is someone who emulates gang members, including dressing the part and throwing signs, but is not yet a member. Hunter explained that gangs target specific individuals for membership based on characteristics that are attractive to the gang, such as physical or mental ability. Some gangs induct members through a physical beating, but other gangs use an invitation process. Hunter testified he is aware of instances of WSC or “West Siders” using both processes. He also testified that gang units, including in Kern County, have a practice of documenting people who are seen with gang members and, therefore, a lot of people become documented as gang members based just on their associations.

Hunter described gang tattoos associated with WSC and testified that he would expect someone who has been a WSC gang member for approximately seven years to have some type of gang tattoo. He agreed that WSC and ESC are rivals and that the Bloods are occasional WSC rivals. He said he would not expect a WSC gang member to wear solid red shorts or a shirt, which is associated with the Bloods, or royal blue, which is associated with the ESC.

Hunter testified that it is not unusual for someone who grew up in an area to associate with gang members also living in that area. He also testified that sometimes gang members take actions that are not related to the gang, such as selling drugs to obtain money to care for their children. He explained that, in general, talking to the police runs contrary to gang culture and being labeled a snitch is looked down upon but, sometimes, gang members nevertheless educate the police on the gang’s activities and lifestyle.

Defense counsel provided Hunter with the following hypothetical question: “An individual who has had contacts with police on a number of occasions, there’s been some discussion as to whether or not he’s affiliated with [WSC]. Officers indicated he has acknowledged association or membership with [WSC]. [¶] On the night in question there is a hat with the letters TC on it, and also there is—the individual is wearing a turquoise shirt under a black hoodie and also has a turquoise hat on, and there are numerous personal items inside the vehicle. There is testimony that the individual’s in the process of moving from one location to the next. He’s pulled over for loud music and has a discussion with the officers regarding gang affiliation.” Hunter opined that the individual in the hypothetical was not transporting the gun for the benefit of or in association with the gang, and he explained on redirect that gangs do not use guns that are traceable.

During cross-examination, Hunter testified that not all gang members have tattoos. He also testified that flying colors has declined overall, but gangs now use baseball caps rather than bandanas, which is “an old way of flying colors.” Hunter agreed that “CT” is associated with Carnation Tract, a WSC subset, and he testified that he would expect retaliation following a gang-related homicide, that shooting a rival could elevate one’s gang status, that gang members carry weapons for offensive and defensive purposes, and that most of the street gang violence is effected through the use of firearms. He also agreed that a legally purchased firearm can be used in an illegal manner, but testified that it would be highly unlikely a legally purchased firearm would be used for the benefit of, at the direction of, or in association with a criminal street gang.

Hunter testified that he does not consider jail booking responses significant because the questions regarding membership or association, and inside or outside of jail, are compound. Although evidence that defendant was wearing a turquoise hat during the offense is a factor for consideration, Hunter opined that defendant was not a member of WSC at the time of the offenses and is not presently a member of WSC.

III. Rebuttal

Finally, during rebuttal testimony, Escobedo and Martinez testified, consistent with their testimony on direct examination, that the firearm was located on the front passenger seat, its slide was not in the locked-back position, the gun case in the trunk did not have a lock on it, and one magazine was located in the gun case while the other two were in the cabin of the vehicle. They also testified that no one told defendant not to move or he would be killed, and that defendant's statements regarding being a corrections officer and having a CCW were made spontaneously after Escobedo spotted the firearm.

DISCUSSION

I. Sufficiency of the Evidence Supporting Penalty Provision Findings

A. Standard of Review

“The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense” (*Carella v. California* (1989) 491 U.S. 263, 265, citing *In re Winship* (1970) 397 U.S. 358, 364), and the verdict must be supported by substantial evidence (*People v. Zamudio* (2008) 43 Cal.4th 327, 357). On appeal, the relevant inquiry governing a challenge to the sufficiency of the evidence “‘is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) “The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Zamudio, supra*, at p. 357.)

“In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.” (*People v. Zamudio, supra*, 43 Cal.4th at p. 357.) “[I]t is the jury, not the appellate court which must be convinced of

the defendant's guilt” (*People v. Nguyen, supra*, 61 Cal.4th at pp. 1055–1056.) “A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.” (*People v. Zamudio, supra*, at p. 357.) However, “speculation, supposition and suspicion are patently insufficient to support an inference of fact.” (*People v. Franklin* (2016) 248 Cal.App.4th 938, 951 (*Franklin*); accord, *People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Xiong* (2013) 215 Cal.App.4th 1259, 1268.)

B. Background

“In 1988, the Legislature enacted the California Street Terrorism Enforcement and Prevention Act (the STEP Act). (§ 186.20 et seq.)” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) ““Underlying the STEP Act was the Legislature’s recognition that “California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.” (Pen. Code, § 186.21.) The act’s express purpose was “to seek the eradication of criminal activity by street gangs.” [Citation.] [Citation.] In pursuit of this goal, the STEP Act focuses upon ‘patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs.’ (§ 186.21.)” (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1129, fn. omitted (*Rodriguez*).)

Relevant here, the STEP Act creates an alternate penalty provision that applies to gang related crimes. (§ 186.22, subd. (d); *Robert L. v. Superior Court, supra*, 30 Cal.4th at p. 900.) The penalty provision has two prongs.¹² (*Albillar, supra*, 51 Cal.4th at p. 59; *Franklin, supra*, 248 Cal.App.4th at p. 948.) “The first prong requires proof that the underlying felony was ‘gang-related,’ that is, the defendant committed the charged

¹² As previously stated in footnote 2, *ante*, the enhancement under subdivision (b) and the penalty provision under subdivision (d) of section 186.22 share the same elements, and we rely herein on cases that have interpreted the enhancement.

offense ‘for the benefit of, at the direction of, *or* in association with any criminal street gang.’” (*Franklin, supra*, at p. 948, quoting § 186.22, subd. (b)(1), italics added; accord, *Albillar, supra*, at pp. 59–60.) “The second prong ... requires that a defendant commit the gang-related felony ‘with the specific intent to promote, further, or assist in any criminal conduct by gang members.’” (*Albillar, supra*, at p. 64, quoting § 186.22, subd. (b)(1); accord, *Franklin, supra*, at p. 948.)

Although gang membership is not an element of the penalty provision, gang evidence can nevertheless bolster the prosecution’s theory on the elements it is required to prove. (*People v. Sanchez, supra*, 63 Cal.4th at pp. 698–699; *People v. Gutierrez* (2009) 45 Cal.4th 789, 820; *People v. Hernandez, supra*, 33 Cal.4th at pp. 1044–1049; *People v. Villa–Gomez* (2017) 9 Cal.App.5th 527, 541.) “Gang membership is simply circumstantial evidence establishing that the crime was gang related and a motive for why a defendant may have harbored the ‘specific intent to promote, further, or assist in any criminal conduct by gang members.’” (*People v. Villa–Gomez, supra*, at p. 540.)

C. Analysis

1. Parties’ Positions

On appeal, defendant claims that as to the first prong of the penalty provision, the jury’s findings that the concealed weapon offenses were committed for the benefit of or in association with WSC are not supported by substantial evidence.¹³ In support of his argument, defendant relies on this court’s decisions in *In re Frank S.* (2006) 141 Cal.App.4th 1192 (*Frank S.*) and *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*), and on the Court of Appeal’s decision in *People v. Ochoa* (2009) 179 Cal.App.4th 650 (*Ochoa*).

¹³ The prosecutor did not theorize that the offenses were committed at the direction of WSC nor did the gang expert opine they were. Our discussion is, therefore, limited to the evidence that the offenses were committed for the benefit of or in association with the gang.

In *Frank S.*, the minor was riding his bike alone when he failed to stop at a red light and he provided the officer who stopped him with a false name. (*Frank S.*, *supra*, 141 Cal.App.4th at p. 1195.) The officer found a knife, a drug bindle and a red bandana on the minor and, after his arrest, the minor told the officer that he was carrying the knife for protection “against ‘the Southerners’ because they feel he supports northern street gangs. [He] also stated he has several friends in the northern gangs.” (*Ibid.*) This court concluded that “[the minor’s] criminal history and gang affiliations cannot solely support a finding that a crime is gang-related under section 186.22” and reversed the gang enhancement. (*Id.* at pp. 1199, 1200).

In *Ramon*, this court again found a gang enhancement unsupported by substantial evidence. (*Ramon*, *supra*, 175 Cal.App.4th at p. 853.) In that case, a sheriff’s deputy pulled the defendant over while he was driving a stolen truck in Colonia Bakers gang territory. (*Id.* at p. 847.) Another man was riding in the truck with the defendant and the deputy found an unregistered gun under the driver’s seat. (*Ibid.*) Relying on the facts that the defendant and his passenger were active Colonia Bakers members and the defendant was pulled over in Colonia Bakers territory, the gang expert testified the stolen vehicle and unregistered firearm benefitted the gang because they were tools to facilitate other crimes and the gang commits crimes. (*Id.* at pp. 847–848, 849.)

This court found the facts on which the expert based his opinion—gang membership and presence in gang territory—were insufficient to support his opinion as to the defendant’s intent and, therefore, his opinion did not constitute substantial evidence in support of the jury’s finding. (*Ramon*, *supra*, 175 Cal.App.4th at pp. 851, 853.) We observed, however, that “[t]he analysis might be different if the expert’s opinion had included ‘possessing stolen vehicles’ as one of the activities of the gang. That did not occur and we will not speculate. [¶] Simply put, in order to sustain the People’s position, we would have to hold as a matter of law that two gang members in possession of illegal or stolen property in gang territory are acting to promote a criminal street gang.

Such a holding would convert section 186.22[, subdivision](b)(1) into a general intent crime. The statute does not allow that.” (*Id.* at p. 853.)

Finally, in *Ochoa*, the Court of Appeal, relying in part on *Ramon* and *Frank S.*, concluded that the gang enhancement was not supported by substantial evidence. (*Ochoa, supra*, 179 Cal.App.4th at pp. 659–661, 665.) In *Ochoa*, the jury found true the gang enhancements attached to the offenses of carjacking and being a felon in possession of a firearm. (*Id.* at p. 652.) The defendant acted alone when he demanded the victim’s vehicle at gunpoint, and he was not wearing gang colors, did not flash any gang signs, and did not make any gang-related statements. (*Id.* at p. 653.) The Court of Appeal found that “[t]he sergeant’s testimony, as to how [the] defendant’s crimes would benefit [the gang], was based solely on speculation, not evidence,” and that “[t]he gang enhancement cannot be sustained based solely on [the] defendant’s status as a member of the gang and his subsequent commission of crimes.” (*Id.* at p. 663.)

The People attempt to distinguish *Frank S.* on the basis that here, the “weapons violations, which were primary activities for the [WSC], occurred in the heart of gang territory.” In contrast to the gang expert in *Ramon*, the People point out that Montgomery identified weapons offenses as a primary activity of WSC. Finally, the People argue that unlike in *Ochoa*, here defendant was wearing gang clothing near Lowell Park, a WSC stronghold; he had a holster on his hip; and he referred to recent ESC-related violence in the neighborhood. In response, defendant asserts that although the People argue the cases he relies on are distinguishable, they do not identify any specific authority supporting their position that the “sparse evidence” in this case suffices to support the gang related penalty provision.

We agree with defendant that *Frank S.*, *Ramon* and *Ochoa* are instructive and notwithstanding the People’s position to the contrary, we are not persuaded that the facts of this case are meaningfully distinguishable from those in *Frank S.*, *Ramon* and *Ochoa*.

As we shall explain, we conclude that the evidence in this case is insufficient to support the jury's gang findings and those findings must be reversed.

2. Insufficient Evidence that Concealed Weapon Offenses Committed for Benefit of or in Association with WSC

a. WSC Membership and Gang Clothing

We agree with the People that there is ample support for the gang expert's opinion that defendant was a member of WSC at the time of the offenses, and defendant was wearing the gang's color when he was pulled over.¹⁴ However, "[a] gang [finding] cannot be sustained based solely on [a] defendant's status as a member of the gang and his subsequent commission of crimes" (*Ochoa, supra*, 179 Cal.App.4th at p. 663; accord, *Frank S., supra*, 141 Cal.App.4th at p. 1199) and, unlike situations where more than one gang member comes together to commit crimes, which may itself support a reasonable inference that the crimes were committed in association with the gang and with the specific intent required, defendant acted alone (*Albillar, supra*, 51 Cal.4th at pp. 62, 68; accord, *People v. Garcia* (2016) 244 Cal.App.4th 1349, 1367; *Rios, supra*, 222 Cal.App.4th at pp. 573–574; see *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ["[T]he typical close case is one in which one gang member, acting alone, commits a crime."]).

b. Location

The People argue that it is "significant" that defendant committed the offenses "in the heart of [WSC] gang territory." A defendant's presence in gang territory during the commission of a charged crime is undoubtedly a relevant factor in some cases, but it must be viewed in the context of the evidence and, here, the record does not support an

¹⁴ Our determination that the penalty provision findings are not supported by substantial evidence renders defendant's claim of evidentiary error moot, but we observe that "when reviewing the sufficiency of the evidence for purposes of deciding whether retrial is permissible, the reviewing court must consider *all* of the evidence presented at trial, including evidence that should not have been admitted." (*People v. Story* (2009) 45 Cal.4th 1282, 1296.)

inference that defendant was in WSC territory for any gang related purpose and although emphasis was placed on defendant's proximity to Lowell Park, the record also does not support an inference that he was going to or coming from Lowell Park when he was pulled over. To the contrary, defendant testified that at the time he was pulled over, he was in the process of moving his personal belongings from his old residence, which was located within WSC territory, to his new residence and that he was traveling the most convenient route between those two locations. This evidence was uncontroverted and, consistent with defendant's explanation, Martinez observed the trunk of defendant's car was full of clothing and Escobedo described the trunk contents as "miscellaneous" and "disheveled."

c. Prior Shooting and Self-defense

The People also point out that defendant was previously shot by a rival gang member, and he admitted he had the firearm for protection and was concerned about gang related violence on the streets. However, defendant was shot in 2011 and he legally purchased the firearm almost two years later, in 2013. Critically, the People do not point to any evidence tethering defendant's concealment of his personal firearm, two years postshooting and admittedly obtained for self-protection, to WSC. The desire to have a weapon for defensive purposes is not unique to criminal street gangs and the People do not claim to the contrary.

d. Gang Expert's Testimony

1) In Association with WSC

The offenses in this case were confined to carrying a concealed firearm in a vehicle. Montgomery opined that carrying a concealed weapon in a vehicle under circumstances mirroring the facts in this case was done in association with the gang because the driver was wearing gang clothing and the offense was committed near the gang stronghold of Lowell Park. However, Montgomery conceded that defendant was not coming from Lowell Park when he was stopped and, where the evidence shows that

defendant lived in WSC territory, he was in the process of moving residences and was proceeding along the most convenient route between those locations, his mere presence in gang territory there does not support a reasonable inference that he was carrying a concealed weapon in association with WSC.

This leaves the clothing: defendant was wearing a turquoise hat and shirt, and there was a TC hat on the seat next to him. Given that the color turquoise and TC hats are associated with WSC and the evidence of defendant's ties to WSC, it is reasonable to infer that defendant was wearing gang clothing. However, as previously stated, gang membership is not an element of the penalty provision and association with or membership in a criminal street gang alone is insufficient to support the jury's findings because the penalty provision may not "be used merely to punish gang membership." (*Rios, supra*, 222 Cal.App.4th at p. 574.) Accordingly, we conclude that the evidence defendant was a WSC member and was wearing gang colors at the time of the offenses is, without more, insufficient to support the finding that the offenses were committed in association with WSC.

2) For the Benefit of WSC

Montgomery also opined that carrying a concealed firearm in a vehicle benefits the gang because firearms are used both for defensive purposes and for offensive purposes, such as committing robberies and intimidating witnesses. Montgomery elaborated that gang members can use firearms to commit robberies, which in turn nets money for the gang to buy more ammunition for their firearms or narcotics to sell, and he testified that robberies, purchasing narcotics for sale and illegal gun possession are primary activities of WSC. However, Montgomery conceded that it is rare for gang members to have guns registered to themselves because such guns are traceable and that they use guns purchased on the streets with no connection to the gang.

While an expert may not opine on the defendant's guilt, the California Supreme Court has recognized that "[e]xpert opinion that particular criminal conduct benefited a

gang’ is not only permissible but can be sufficient to support the ... 186.22, subdivision (b)(1), gang enhancement.” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048, quoting *Albillar, supra*, 51 Cal.4th at p. 63.) It remains, however, that the underlying offense to which the penalty provision is attached must be gang related (*Rodriguez, supra*, 55 Cal.4th at p. 1138; *Albillar, supra*, at p. 60), and “[w]hile an expert may render an opinion assuming the truth of facts set forth in a hypothetical question, the ‘hypothetical question must be rooted in facts shown by the evidence.’ [Citation.] Indeed, an ‘expert’s opinion may not be based “on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors.”” (*Franklin, supra*, 248 Cal.App.4th at p. 949.)

The issue here is that Montgomery’s opinion is not rooted in facts in evidence. (*People v. Vang, supra*, 52 Cal.4th at pp. 1045–1046.) The record is devoid of any evidence that defendant had committed *any* crimes with a firearm to benefit the gang, let alone robbery or witness intimidation, or that he was planning to do so. Moreover, Montgomery conceded that it would be rare for a gang member to use a legally registered—and therefore traceable—firearm to commit gang crimes. There is also no evidence linking defendant’s general desire to protect himself and his family vis-à-vis a registered firearm to any benefit to the gang. Under these circumstances, Montgomery’s opinion that the offenses were committed for the benefit of WSC was based on pure speculation and as such, does not constitute substantial evidence. (*Franklin, supra*, 248 Cal.App.4th at pp. 947–948.)

In sum, we conclude that the jury’s findings that defendant committed the concealed weapon offenses “for the benefit of, at the direction of, or in association with any criminal street gang” is not supported by substantial evidence. (§ 186.22, subd. (d).) Although defendant does not separately address the specific intent prong of the penalty provision, it necessarily follows that the deficiencies in the evidence we have discussed also fatally undermine the findings that defendant concealed the firearm “with the

specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (d).) The jury’s penalty provision findings as to count 1 and count 2 are therefore reversed.

II. *Pitchess* Review

A. Background

Defendant filed a motion seeking discovery of Officer Escobedo’s personnel records with respect to any information or documents pertaining to false statements in reports, fabrication of witness testimony in reports, false testimony, falsification of probable cause and/or reasonable suspicion, acts involving moral turpitude, and any other evidence of or complaints of dishonesty. (Evid. Code, § 1043.) The prosecutor opposed the motion. The trial court conducted an in camera review of Escobedo’s personnel file and found no information subject to disclosure.

Defendant requests we conduct an independent review of the *Pitchess* proceedings to ensure that the trial court complied with the procedural requirements set forth in *People v. Mooc* (2001) 26 Cal.4th 1216, 1228–1229 (*Mooc*), and that it did not abuse its discretion in refusing to disclose any information from Escobedo’s personnel file. The People do not oppose this request.

B. Legal Standard

The procedure for obtaining discoverable information from law enforcement personnel files is well established. Pursuant to Evidence Code section 1043, subdivision (b), “on a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. [Citation.] Good cause for discovery exists when the defendant shows both “materiality” to the subject matter of the pending litigation and a “reasonable belief” that the agency has the type of information sought.” [Citation.] A showing of good cause is measured by ‘relatively relaxed standards’ that serve to ‘insure the production’ for trial court review of ‘all

potentially relevant documents.’ [Citation.] If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. [Citation.] Subject to certain statutory exceptions and limitations [citation], ‘the trial court should then disclose to the defendant “such information [that] is relevant to the subject matter involved in the pending litigation.”’” (*People v. Gaines* (2009) 46 Cal.4th 172, 179.)

On appeal, a defendant may request we conduct an independent review of the proceedings and the trial court’s determination regarding the presence or absence of discoverable information. (*People v. Townsel* (2016) 63 Cal.4th 25, 67–68; *People v. Yearwood* (2013) 213 Cal.App.4th 161, 179–180.) “A trial court is afforded wide discretion in ruling on a motion for access to law enforcement personnel records. The decision will be reversed only on a showing of abuse of discretion.” (*People v. Yearwood, supra*, at p. 180, citing *People v. Hughes* (2002) 27 Cal.4th 287, 330.)

C. No Abuse of Discretion

We have independently reviewed the record and examined Escobedo’s personnel file. We find the trial court followed the proper procedure and created an adequate record of the in camera hearing (see *Mooc, supra*, 26 Cal.4th at pp. 1228–1229; *People v. Yearwood, supra*, 213 Cal.App.4th at p. 180), and we conclude the court did not abuse its discretion in determining that there was no information subject to disclosure (*People v. Samayoa* (1997) 15 Cal.4th 795, 827). We therefore affirm the ruling.

DISPOSITION

The jury’s penalty provision findings pursuant to Penal Code section 186.22, subdivision (d), are reversed and this matter is remanded for resentencing on counts 1 and 2. The trial court is directed to transmit a copy of the clerk’s minutes to the appropriate authorities for the purpose of clarifying reversal of the penalty provision findings under

the gang statute and the resulting reduction of count 1 and count 2 from felonies to misdemeanors. The judgment is otherwise affirmed.

MEEHAN, J.

WE CONCUR:

LEVY, Acting P.J.

PEÑA, J.